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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

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Petitioners,

vs

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, and others, respectfully petition this Honorable Court for a writ of certiorari to the Supreme Court of Illinois. Writ of certiorari was denied in this case (No. 615) for the want of a final judgment, but such an objection does not apply to the present petition.

Summary Statement of the Matter Involved.

This case involves the validity of paragraphs (a), (b), (c) and (d) of injunctions the provisions of which are set forth at pages 5-6 of this petition. The validity of

such paragraphs is contested on the ground that they restrain freedom of speech and of assembly in violation of the Fourteenth Amendment to the Constitution of the United States. No issue was made in the Appellate or Supreme Court of Illinois or is now made as to the validity of the provisions of the injunctions so far as they enjoin acts of violence.

A temporary injunction, in the terms set out on page 5 was granted by the Circuit Court of Cook County, Illinois, on July 17, 1937, upon the basis of complaint by Swing and his employees. (R. 13-14.) The complaint alleged an effort upon the part of defendant unions and their members to unionize Swing's beauty parlor, whose employees were not members of the union; that violence had been used in picketing and solicitation; and that pickets carried signs that "This Beauty Shop is Unfair to Organized Labor"; and that such signs were false and malicious.

Subsequent to the issuance of the temporary injunction, the defendants barbers and hair dressers unions filed answers, on July 27, 1937, and August 26, 1937. (R. 16, 18.) The answers of defendant Hairdressers and Cosmetoligists union denied acts of violence; alleged that the signs displayed by pickets were true and that there was never more than one picket in front of or in the vicinity of Swing's shop; admitted that his employees were not members of the union but alleged that they were threatened with discharge if they joined the union; and alleged a right to picket or unionize Swing's shop and to obtain for its employees wages and hours commensurate with that of other employees. (R. 18-23.)

Thereafter, on January 20, 1938, the Circuit Court of Cook County, Illinois, on motion of defendants to dissolve the injunction and dismiss the cause for want of

equity on the face of the complaint, dissolved the injunction, struck the complaint for want of equity on its face, set a day for the assessing of damages, and gave plaintiffs leave to file an amended complaint. (R. 15.) Plaintiffs elected to stand on their complaint, and on February 15, 1938, the Circuit Court of Cook County struck the complaint for want of equity on its face, dismissed the cause, and assessed damages against the plaintiffs. (R. 15, 16.)

Under Illinois practice: "A motion to dismiss, like a demurrer, admits such facts as are directly alleged. A demurrer or motion to dismiss does not admit conclusions drawn by the pleader." *Barzowski* v. *Highland Park State Bank*, 371 Ill. 412 (1939), p. 416.

The plaintiffs appealed to the Appellate Court for the First District of Illinois. That Court on December 21, 1938, without remandment of the case, reversed, annulled and set aside the orders of the Circuit Court bearing date of January 20, and February 15, 1938, and taxed costs against appellees, who were defendants below. (R. 23-24.) The Appellate Court granted leave to appeal to the Supreme Court of Illinois by a certificate of importance. (R. 24.) The Supreme Court of Illinois entered judgment on June 19, 1939, affirming the judgment of the Appellate Court and taxing costs against appellants in that Court, who were the defendants in the trial court. (R. 33.) The Supreme Court of Illinois denied rehearing on October 13, 1939. (R. 34.)

The opinion of the Supreme Court of Illinois appears in 372 Ill. 91, and is set forth in full in the record, together with the dissent therein. (R. 24.) The opinion is primarily based on the view that allegations of violence are admitted by the motion to dismiss, and that all provisions of the temporary injunction must be treated as a whole. The first sentence of the dissent clearly shows that appel-

lants in that case at no time contested the validity of provisions of the injunction directed against acts of violence.

Upon remandment of the case by the Supreme Court of Illinois, a decree was entered by the Appellate Court of Illinois, First District, on February 16, 1940, making permanent the terms of the injunction originally issued by the trial court and applying such injunction not only to the unions and their members but "to all other persons, as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." The decree of the Appellate Court is set out in full in the record. (R. 36-39.)

Two provisions of the decree of the Appellate Court emphasize the issues here made by petitioners:

(1) Paragraph 3 of the decree specifically finds that the right to injunctive relief is based upon the absence of an employer-employee relationship between the parties.

(2) The injunction is expressly made applicable, not only to the defendants, but to "all persons acting in concert with said trade union defendants."

With respect to the paragraphs of the injunction forbidding peaceful action which are here contested by petitioners, the finding by the Appellate Court that the right to injunctional relief arises out of the absence of an employer-employee relationship removes from the case all elements of force or of alleged untrue signs which, if well pleaded, and not merely conclusions of the pleader, were admitted as a matter of pleading in the motion to dismiss the complaint. And the dismissal of writ of error by the Supreme Court of Illinois constitutes an affirmance of such finding.

A writ of error was sued out in the Supreme Court of Illinois to review the validity of the decree entered by the Appellate Court making permanent the terms of the injunction here involved. Defendants in error moved to dismiss the writ of error on the ground that all the rights of the parties had been finally settled on previous appeal, and that plaintiffs in error were not entitled to a further review. (R. 43-45.) This motion was granted by the Supreme Court of Illinois and writ of error dismissed on April 4, 1940. (R. 46-47.)

The acts enjoined by the temporary and permanent injunctions are as follows:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

(b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of picketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing, or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assault-

ing prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats, coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

(h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden.

The matter involved in the case is that as to whether a state court may restrict the freedom of speech and of assembly guaranteed by the Fourteenth Amendment by declaring the objective of peaceful unionizing of a non-union shop to be unlawful under the law of that state and by enjoining as unlawful all peaceful means of accomplishing that objective.

This Court Has Jurisdiction.

1. The federal constitutional issues are properly preserved. This case presents constitutional issues as to both the temporary and the permanent injunctions. If an injunction of this character violates the constitution of the United States, petitioners and those in like circumstances would receive little comfort from a protection against permanent injunctions alone. The constitutional issue as to the temporary injunction is properly preserved, because, certiorari having been denied by this Court with respect to the temporary injunction, petitioners now invoke the jurisdiction of this Court with respect to the temporary injunction at the first opportunity open to them. In this respect the situation is the same as in *Gant* v. *Oklahoma City*, 289 U. S. 98, 100.

The issue as to the validity of the temporary injunction in this case under the terms of the Fourteenth Amendment was presented to and determined by the Supreme Court of Illinois when this case was first before that court. The opinion and dissent are incorporated in the record. (R.

24-33.) Although the petitioners do not agree with the statement of their contention by the Supreme Court of Illinois, such statement clearly shows that the federal issue was presented and decided. The Supreme Court of Illinois said:

> "It is contended by them (the petitioners in this Court) that Section 4 of Article 2 of the Constitution of Illinois and the fourteenth amendment to the Constitution of the United States protect them in their exhibition of the placards and signs derogatory to the plaintiff's business and intended to destroy it."

The issue presented by the terms of the injunction and argued in the state court did not involve an intent to destroy plaintiff's business, although this is the basic idea in the opinion of the Supreme Court of Illinois. The issue includes all matters covered by paragraphs (a), (b), (c) and (d) as supplemented by paragraph (h) of the injunction, but in no respect contested the power of the court to enjoin acts of violence.

The issue argued in the state court that the injunction was directly violative of the Illinois Anti-Injunction Act of 1925 is not presented here, but in holding the state issue to be sufficient, Mr. Justice Farthing, in dissent, properly said that "the question of free speech * * * is virtually all the majority opinion covers." (R. 32.)

With respect to the permanent injunction, an assignment of error presented to the Supreme Court of Illinois on writ of error preserves federal constitutional issues as to due process of law and denial of privileges and immunities of citizens of the United States, both under the Fourteenth Amendment. (R. 39.) Action by the Supreme Court of Illinois upon these assignments was necessarily involved in the granting of the motion of defendants in error for dismissal of writ of error on the ground that all rights of the parties had been settled on previous appeal. (R. 45-47.) Neither a state nor municipal enactment is here

involved, but the privileges and immunities clause of the Fourteenth Amendment is not limited to legislation enacted by a state. It applies to any law which the state "shall make or enforce."

2. There is a final judgment by the highest court in the state in which decision could be had. Dismissal of writ of error constitutes a final judgment by the Supreme Court of Illinois, and all remedies in the state courts have been exhausted.

This Court may have some question as to whether there is any further right of review by the Supreme Court of Illinois. One ground for dismissal of writ of error in *Matthews* v. *Huwe*, 269 U. S. 262, p. 265, was that plaintiffs in error did not seek review by certiorari after their petitions for writ of error had been denied by the State Supreme Court.

In Illinois, writ of error is the only method of review by the State Supreme Court of a decision of an Appellate Court where a constitutional issue has been first raised in the Appellate Court. *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, p. 29. However, if appeal as well as writ of error should lie, each is a review as of right, and if, by mistake, the one is sought rather than the other, Rule 28 of the Illinois Supreme Court provides that "the case shall be considered as if the proper method of review had been employed."

Section 75 of the Illinois Civil Practice Act (Ill. Rev. Stats. 1939, Ch. 110, Sec. 199) provides for direct appeal to the State Supreme Court from trial courts in cases involving constitutional issues, and where appeal is taken to the Appellate Court in a case involving constitutional issues, such issues are waived. This provision was discussed by this Court in *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190. Discretionary review of the Appellate Court by the Supreme Court does not apply

to constitutional issues; but review is a matter of right when the constitutional issue presents itself in the Appellate Court. Here the dismissal of writ of error by the Supreme Court relates to a constitutional issue arising out of a decree of the Appellate Court and thus first presenting itself in that court. All remedies of review by the state Supreme Court have been exhausted.

3. The writ is directed to the proper court. It may be argued that dismissal of writ of error by the Supreme Court of Illinois was not the final judgment and that the writ of certiorari should lie to the Appellate Court. But there is no question of the jurisdiction of the Supreme Court of Illinois to entertain the writ of error, and in this respect the present case is clearly in line with the holding of this Court in *Van Huffel* v. *Harkelrode,* 284 U. S. 225, page 230. There was no refusal to take the case for want of jurisdiction, as in *Randall* v. *Board of Commissioners,* 261 U. S. 252. The rule stated in *Matthews* v. *Huwe,* 269 U. S. 262, clearly applies here. And here, as in the *Van Huffel* case, the record remained in the possession of the State Supreme Court, and the writ should be directed to the court having the record in its possession.

4. The writ is directed to the proper judgment. This Court having already, on a prior petition, taken the view that there was a want of final judgment in this case as previously presented, the questions sought to be presented cannot now be said to arise on the first judgment and not on the second, as in *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, 47. The issues presented by both judgments are substantially the same, but as heretofore indicated, the issues as to both the temporary and permanent injunctions are now presented to this Court.

5. The relief sought is proper for the parties in this case. Certain of the petitioners are associations and as such are subject to the rule that liberty of speech and of

assembly "is the liberty of natural, not artificial, persons." Mr. Justice Stone in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, p. 527. In the present case not only the unions but also all members of the several unions are made defendants, and the injunctions apply in terms to all defendants. (R. 1, 13-14.)

The Question Presented.

The only question presented to this Court is that as to whether the injunctions involved herein deprive of rights of speech and assembly in appropriate public places, and establish a previous judicial censorship of speech and of the press, violative of constitutional rights under the Fourteenth Amendment, as guaranteed by the due process clause and the clause forbidding any law which shall abridge the privileges or immunities of citizens of the United States.

This question presents the issue as to the correctness of the State court's position that the whole scheme of action by organized labor in the present case is unlawful and that therefore all otherwise lawful acts which may seek to bring pressure upon the employer are unlawful and may properly be enjoined.

Reasons Relied on for Allowance of Writ.

A substantial federal question presents itself with respect to the scope of state judicial censorship upon the rights of speech and assembly. This question has not been heretofore determined by this Court.

So far as petitioners are informed, this case presents for the first time the question as to whether state courts in their determination of the law in the several states may establish standards defining and limiting the opera-

tion of federal guarantees of freedom of speech and of assembly.

This case involves the question as to whether an injunction may be issued by a state court prohibiting officers and members of local organized groups of barbers and hairdressers and all other members of the American Federation of Labor and of the Chicago Federation of Labor (petitioners here) together with "all persons acting in concert with said trade union defendants and individual defendants," from (1) giving publicity to their view that the beauty shop of respondent Swing is unfair to organized labor, through the exhibition of signs or placards "designed to induce and influence persons not to enter plaintiff Swing's (respondent's) place of business" or (2) from soliciting persons not to enter his place of business or to do business with him; or (3) from picketing or maintaining any picket or pickets at or near the place of business of respondent; or (4) from patrolling or congregating in front of or in the vicinity of respondent's place of business, in furtherance of picketing; even though the acts of giving publicity or soliciting or of picketing or patrolling may be peaceful and even though the future statements upon signs or placards may be in no sense untrue. It presents the issue as to whether an injunction of a state court may accomplish the purpose which this Court has held may not be accomplished by state statute or by municipal ordinance. *Schneider* v. *State*, 60 S. Ct. 146, 84 Law Ed. 115, decided by this Court on November 22, 1939.

This Court has held in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931) that a state law may not authorize the courts to enforce a previous censorship on freedom of speech and of the press. The *Near* case involved a single newspaper. The present case involves a single employer,

but the same principles apply in the *Near* case to all newspapers, and in the present case to all labor unions and all employers.

Although the American Federation of Labor and the Chicago Federation of Labor and the members thereof are parties in this case, they are so because of the membership therein of local unions, and the pleadings show that the injunction is primarily directed against members of the local unions of barbers and hairdressers because of their actions or anticipated actions with respect to a nonunion beauty shop and nonunion workers in the same industry and within the same territorial area. The decree of the Appellate Court of Illinois applies also to "all persons acting in concert with said trade union defendants and individual defendants." (R. 1-13, 16-18, 18-23, 36-39.)

The acts enjoined by the state court are set forth in eight paragraphs of the injunction, which are printed above. The text of the injunction as issued by the trial court appears in the record at page 14, and the clauses (a) to (h) enjoining certain practices are identical in the injunction in the trial court and in the decree of the Appellate Court. (R. 36-39.) Although there are intimations to the contrary in the opinion of the Supreme Court of Illinois, the case presented to that court in no way involved the validity of paragraphs (e), (f) and (g) of the injunction. The validity of these paragraphs was fully recognized by the appellants in that court, who are the petitioners here; and a statement to this effect appears in the dissenting opinion. (R. 29.)

Paragraphs (a) and (b) of the injunctions present substantially the same issues as those in *Thornhill* v. *State of Alabama* (No. 514) and *Carlson* v. *State of California* (No. 667), except that here an injunction seeks to accomplish the same result as statutes and ordinances in

those cases. Paragraphs (c) and (d) of the injunction (R. 14, 36-39) impose restrictions upon speech and assembly much broader than those in the *Thornhill* and *Carlson* cases.

It will be noted that (except as to paragraph (h)), each paragraph is independent of the other and that paragraphs (c) and (d) forbid not only peaceful action, but any assembly upon streets or other public places for the purpose of making representations to persons either orally or in writing. Paragraph (h) forbids not only participation in such acts but also "advising, encouraging or assisting" therein.

Attention should also be called to the fact that paragraph (a) is limited to acts "at or near the place of business of plaintiff"; and that paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of the plaintiff's business;" but that paragraph (d) has no limits of time or place but restrains soliciting, influencing or attempting to influence, whether in public or private place or in public or private statement or conversation.

The breadth of paragraph (d) of the injunctions is such as to prohibit a local barbers' union as a member of the Chicago Federation of Labor from stating its views regarding the respondent at any meeting of that organization.

And, in addition, all members of the Chicago Federation of Labor and of the American Federation of Labor are subject to the terms of this injunction; and every act of solicitation or encouragement of solicitation on the part of any such member is subject to punishment as contempt of court. Neither the Chicago Federation of Labor nor the American Federation of Labor nor local unions may attempt in any manner to unionize present or

future employees of respondent Swing, or to discourage their members or others from patronizing him. Moreover, attention should again be called to the fact that the decree of the Appellate Court makes the injunction applicable to "all persons acting in concert with said trade union defendants and individual defendants."

An analysis of the injunctions in this case clearly shows material restrictions upon freedom of speech and of assembly. Such restrictions may not be imposed by state statute or by municipal ordinance. A decision in this case should determine whether such power may be exercised by state courts.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1939.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Illinois Appellate Court for the First District is reported in 298 Ill. App. 63. The opinion of the Supreme Court of Illinois is reported in 372 Ill. 91 (advance sheet). The opinion and dissent in the Supreme Court of Illinois are printed in full in the record. (R. 24-33.)

Jurisdiction.

With respect to the judicial restraint of rights of assembly and speech under the Fourteenth Amendment, the opinion of the Supreme Court of Illinois raises and determines a substantial federal question not heretofore de-

termined by this Court; and the jurisdiction of this Court is invoked under section 237(b) of the Judicial Code.

A petition for rehearing in this case was denied by the Supreme Court of Illinois on October 13, 1939. (R. 34.)

On remandment to the Appellate Court of Illinois, a decree was entered by that Court on February 16, 1940, making permanent the terms of the injunction previously sustained by the Supreme Court of Illinois. (R. 36-39.) Writ of error to review the action of the Appellate Court was denied by the Supreme Court of Illinois on April 4, 1940. (R. 45-47.) The grounds of jurisdiction are set forth more specifically in the petition for certiorari.

Statement of the Case.

The case involves no issues of fact, but only the question as to the validity of clauses (a), (b), (c) and (d) of injunctions whose terms are set out in full in the record (R. 13-14, 36-39) and in the petition for certiorari.

These clauses forbid

(1) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff;

(2) Patrolling or congregating in front of or in the vicinity of plaintiff's business in furtherance of picketing;

(3) All future exhibition of any sign, placard or other matter in front of or in the vicinity of plaintiff's (respondent's) business "designating plaintiff's business as being non-union or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;"

(4) "Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him."

Paragraph (h) of the injunctions supplements paragraphs (a), (b), (c) and (d) and restrains "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden." The permanent injunction is, in addition, specifically applicable to "all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Paragraph (a) is limited to acts "at or near the place of business of plaintiff," and paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of plaintiff's business." Paragraph (d) is not limited to specific persons, time or place but applies to private or family conversations as well as to all influence exerted in public or in house to house solicitation. And in view of the fact that other and admittedly valid clauses of the injunctions restrain acts of force and violence, these clauses must be construed to restrain peaceful acts.

Errors Relied Upon.

(1) Petitioners assign as error the holding by the Supreme Court of Illinois that the courts of that state may enjoin all types of picketing or patrolling or congregating in furtherance of picketing, and all types of solicitation, and also peaceful assembly upon streets or other public places for the purpose of making representations to persons either orally or in writing, and for the purpose of displaying signs or placards indicating unfairness to organized labor, the injunctions in these respects restraining all future actions irrespective of whether their conduct may be peaceful and irrespective of whether the future representations, signs or placards may be true or false. Petitioners aver that such an injunction is, with respect to these provisions, void on its face because it provides a pre-

vious judicial censorship of speech and assembly, in violation of the Fourteenth Amendment.

(2) The Supreme Court of Illinois also erred in holding that a Court may determine in advance and enjoin future statements which it regards as untrue, or because it regarded prior statements as untrue. In view of the fact that the injunctions on their face forbid future statements, irrespective of their truth or falsity, it may be unnecessary, however, to consider whether the guarantee of freedom of speech by the Fourteenth Amendment includes a freedom to make untrue or false statements without previous censorship, subject to civil and criminal liability for the abuse of the privilege.

(3) The Supreme Court of Illinois erred in holding that the whole scheme of action by organized labor in the present case is unlawful, and that therefore all acts which may seek to bring pressure upon the employer are unlawful and may properly be enjoined as parts of an unlawful scheme. Such a holding is violative of the Fourteenth Amendment.

ARGUMENT.

I.

Previous Censorship of the Exercise of the Right of Assembly and of Speech Is Violative of the Fourteenth Amendment.

It is fully established that previous censorship of the exercise of the right of speech and assembly by means of state statutes or municipal ordinances is violative of the Fourteenth Amendment. *Schneider* v. *State,* 60 S. Ct. 146, 84 L. Ed. 115, decided by this Court November 22, 1939; *Near* v. *State of Minnesota,* 283 U. S. 697. Leaving aside for the moment the question whether state judicial restraint stands upon a different basis, it may here be pointed out that the restraint sought to be imposed in the present case falls within the limits established by this Court with respect to state statutes and municipal ordinances.

One of the cases decided with *Schneider* v. *State* is closely parallel with the present case. *Snyder* v. *City of Milwaukee* involved a Milwaukee ordinance forbidding the circulation or distribution of circulars, handbills or other printed matter in streets and other public places. Here we have a similar prohibition by injunction, with the law so applied as to authorize trial courts in Illinois to issue similar injunctions in all other cases. In the Milwaukee case: "The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians hand bills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it." Snyder's conviction of viola-

tion of the ordinance was reversed by this Court, on the ground that "the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech." In the present case any person performing the same acts as Snyder in the Milwaukee case will be subject to equal or more serious punishment for contempt of court. If the present injunctions are sustained, the courts of Illinois are authorized to accomplish a result which is violative of the Fourteenth Amendment when undertaken by a municipality in Wisconsin.

In *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) "an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places." An injunction accomplishing the same purpose through state judicial action should suffer the same fate.

Under the decisions of this Court, previous restraint upon freedom of speech such as that here imposed is clearly improper with respect to newspaper publication, distribution of circulars, and house to house solicitation. The injunction clauses here attacked forbid these methods and all others as well. All methods by which restraint is sought to be imposed are within the constitutional prohibition; all methods of speech are within the constitutional protection.

The displaying of signs or placards may be less expensive and the only means of publicity available to members of a union, but this certainly is no basis for holding that this method is entitled to less of constitutional protection than the more expensive and thereby less available methods of publicity.

That freedom of speech may result in abuse in some cases is not open to doubt, and penalties have been provided for such abuse. The possibility of such abuse was re-

cently recognized by this Court in *Schneider* v. *State*, 60 S. Ct. 146, 84 L. Ed. 115, when it said:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

A similar answer must be made to efforts to have the courts pass in advance upon what may be said and to enjoin all future statements which they may regard as improper. But the present case is even stronger because the court not only enjoins improper future statements but all future statements.

II.

A Previous Censorship May Not Control Future Untrue Statements, or All Future Statements Because Prior Statements Are Alleged to Be Untrue.

The injunctions in this case are not based on any holding that future solicitation or exhibition of signs will be untrue. But it would be invalid as a previous censorship even though it should limit itself to future untrue statements. This Court properly said in *Patterson* v. *Colorado*, 205 U. S. 454, 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 714.

Previous censorship may not apply to future false statements. It would appear clear that future truthful utterances may not be enjoined because of alleged untruthful utterances in the past.

Moreover, the permanent injunction entered by the Appellate Court of Illinois in this case is not based on any alleged untruthful statements in the past, but upon a finding that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)"; (R. 37); and by dismissal of writ of error the Supreme Court of Illinois sustained this position. (R. 45-47.)

III.

The Scheme of Action by Organized Labor in the Present Case Is Not Unlawful, and Although Unlawful Acts in Seeking Its Accomplishment May Be Enjoined, Separable Lawful Acts May Not Be Restrained.

If a temporary or permanent injunction may be obtained against freedom of expression, as an incident to any injunction forbidding force or violence, there is little left of freedom of speech.

The position of the Supreme Court of Illinois finds some basis in the statement of Dean Roscoe Pound that:

> "A growing number of decisions allow an injunction where the writing or publication is a part of a wrong which would be enjoined of itself." Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. Law Rev. 640 (1916), page 655.

Dean Pound added: "But this would be wrong on Blackstone's theory and also under the view taken in

Brandreth v. *Lance* (8 Paige, 24. N. Y. 1839)." In *Near* v. *State of Minnesota,* 283 U. S. 697, pages 713-714, this Court has approved Blackstone's theory as to previous restraints.

The Supreme Court of Illinois takes the view that there is here an unlawful scheme because (1) no proximate relation of employer and employees exists; (2) the activities of the union will be injurious to the employer; and (3) that if acts approaching violence are admitted, even on the basis of demurrer, all acts become unlawful and may be enjoined by a court of equity.

(1) The absence of a proximate employer-employee relation does not render unlawful the efforts of a labor organization to unionize a shop. Although the Illinois Anti-Injunction Act of 1925 omits the restrictive language of the Clayton Act, the Supreme Court of Illinois has held that it applies only where there is a proximate relation of employer and employee. *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union of Chicago,* 371 Ill. 377 (1939). The construction of a state statute by the highest state court is binding upon this Court; and the state statutory prohibition of injunctions against the matters enjoined in paragraphs (a), (b), (c) and (d) of the present injunction does not apply to the present case, although it would apply if there were a direct employer-employee relation. But a dispute between an employer and a union of non-employee workers in the same industry is not rendered unlawful because it loses the aid of the state anti-injunction law; and the protection of freedom of assembly and of speech comes from the Fourteenth Amendment and not from the state statute. The right to freedom of speech does not depend upon an employer-employee relationship.

Violence established by evidence existed in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257

U. S. 184 (1921). Yet that case, in dealing with non-employees not within the Clayton Act, said as to peaceful persuasion and propaganda, that "It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious;" and the court modified the injunction so far as it restrained persuasion, on the ground that the members of a local union and the union itself "have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." (Pages 209, 212-213.)

In that case the Court not only separated lawful from unlawful acts, but it sustained the rights of organized labor to engage in peaceful persuasion and propaganda, without the aid of statutory protection. The decision was not based on constitutional guaranties, but finds definite support in the First and Fifth Amendments.

Union organizations of non-employees were specifically recognized as having a legal right to employ persuasion and propaganda with respect to non-union employers and employees, the Court saying that to render their combination at all effective "employees must make their combination extend beyond one shop."

It sufficiently appears from the pleadings in the present case that the injunctions are in fact primarily directed against local unions because of their actions or anticipated actions with respect to a nonunion shop and nonunion workers in the same industry and within the same territorial area. (R. 1-13, 16-23, 36-39.) The interest of such unions is greater than that in the *Tri-City Central Trades Council* case. Peaceful presentations of propaganda are not unlawful under such conditions and are protected by the constitutional guarantee of freedom of speech.

(2) The fact that the activities of a union may be injurious to the employer does not render them unlawful. When the *Tri-City Central Trades Council* case, quoted above, was in the United States Circuit Court of Appeals, that Court stated briefly and clearly the rule here applicable. It said:

> "Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employee, which right should be and is recognized as equal to the right of the employer." (238 Fed. 729, page 733).

A similar view is reflected in the opinion by this Court quoted above.

In *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), this Court said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution." (Pages 478, 482.)

The mere fact of injury to the employer because of the exercise of freedom of speech does not justify a previous restraint upon such freedom.

(3) Freedom of assembly and of speech may not be enjoined because associated with or alleged to have been associated with violence. The purpose of the Illinois Anti-Injunction Act of 1925 was to segregate peaceful conduct from that of violence, and to forbid restraint of peaceful action by injunction. With the narrowed construction by the Supreme Court of Illinois, this statute serves its pur-

pose in case of a labor dispute between employer and employees, but not in a labor dispute between an employer and unions of non-employees. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239 (1934), the Court said, at page 260:

> "The mere facts that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceful persuasion. There was therefore no basis for restraining the displaying of the placards and it was error to have done it."

In the *Fenske* case the Illinois Anti-Injunction statute was held to prohibit restraint by injunction of both peaceful picketing and peaceful persuasion, and no difficulty was encountered in the separation of legal from illegal acts. In the present case the Fourteenth Amendment guarantees against restraint of peaceful persuasion by placards or by solicitation, and there is no difficulty in the separation of legal from illegal acts. There was no difficulty in making such a separation in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921).

In order to sustain the restraint here sought to be imposed upon rights guaranteed by the Fourteenth Amendment, it would be necessary to bring the present case within the language of Mr. Justice Holmes who said that "the most stringent protection of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." *Schenck* v. *United States*, 249 U. S. 47 (1919), page 52, quoted with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 716. Similar language is found in *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 417 (1911), page 439. The language in the Gompers and Schenck cases was applied to unlawful conspiracies, and the language referred to was an essential part of the conspiracy.

Here we have no unlawful conspiracy or other unlawful purpose, but rather a valid objective within the language of this Court in the *Tri-City Central Trades Council* case; and we have also admittedly valid portions of the present injunctions restraining the use of force as a means of achieving the lawful objective. The petitioners here seek relief only from a general restraint upon all future peaceful utterances. The right of assembly is necessarily incident to the right of speech which is so involved.

The purpose here is lawful, and has been so recognized by this Court. A statute penalizing peaceful picketing has recently been declared invalid by the Supreme Court of Colorado (*People* v. *Harris*, 91 Pac. (2d) 989); and a similar municipal ordinance of the City of Reno, Nevada, was declared invalid by the Supreme Court of Nevada on November 21, 1939, where the picketing was by members of a union none of whom were employees of the picketed employer. *City of Reno* v. *Second Judicial District Court*, 95 Pac. 2d 994. Here we have an injunction which not only restrains peaceful picketing, but which goes much farther in restraint of freedom of speech and assembly. In speaking of the guarantee of freedom of speech "to every person" by the Constitution of Illinois, the Supreme Court of that state properly said:

> "If a court of equity has power to restrain and punish members of a labor union from speaking, writing or publishing on the subject of a dispute between the union and the employer, then the members of the labor union are not such persons as are within the quoted constitutional provision." *Vulcan Detinning Co.* v. *St. Clair*, 315 Ill. 40, page 47.

IV.

The Fourteenth Amendment Protects Freedom of Speech and Assembly from State Judicial Impairment as Fully and Completely as from Impairment by Other Departments of the State Government.

The municipality is an agent of the state and its action is state action. The court is an instrumentality of the state, and its action is state action. The Fourteenth Amendment forbids any state to deprive of life, liberty or property, without due process of law. The Court must look to the result and not to the instrumentality of the state which accomplishes the result. "Whoever, by virtue of a public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so or the Constitutional provision has no meaning." *Ex parte Virginia,* 100 U. S. 339 (1880).

The due process clause of the Fourteenth Amendment has been systematically construed to apply to all state action, whether legislative, executive or judicial. This Court has carefully protected individual rights against impairment by state judicial action. *Tumey* v. *State of Ohio,* 273 U. S. 510; *Brown* v. *State of Mississippi,* 297 U. S. 278; *Chambers* v. *State of Florida,* 60 S. Ct. 472, 84 L. Ed. 419.

It may, however, be argued that, in protection of freedom of speech and assembly, the Fourteenth Amendment goes no farther than the First Amendment, and that the First Amendment protects only against restraint by Congress and not by other departments of government. It is

true that the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble." But by the Fifth and Fourteenth Amendments these rights are guaranteed against impairment by any department of either national or state government. The due process clause of the Fourteenth Amendment applies to any state action; and it seems clear that this Court would have reached the same result in *Near* v. *State of Minnesota,* 283 U. S. 697, had there been no state statute and had the state court sought to impose the same "previous restraint" upon the basis of a claimed equity jurisdiction.

The clause of the Fourteenth Amendment with respect to the privileges and immunities of citizens of the United States provides that no state "shall make or enforce any law which shall abridge" such privileges, and does not limit itself to the making of a state statute. The term "law" is not limited as in the contract clause, but has the wider application given to it in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

But it may be urged that the determination of labor controversies and of the legality of actions in connection therewith is properly a matter of state regulation and that this Court should therefore follow restrictive decisions of state courts, even though such decisions may curtail freedom of speech and of assembly as recognized by this Court under the Fourteenth Amendment. If this Court were bound by the determinations of state courts as to what constitutes due process of law under the Fourteenth Amendment, review of such determinations by this Court would be useless.

Briefly summarized, the argument here is that a state court may, by calling an act unlawful, be permitted to withdraw it from the protection of the Fourteenth Amend-

ment. At the expense of some duplication, the result of such a position may be indicated.

In the present case and in *Meadowmoor Dairies* v. *Milk Wagon Drivers Union,* 371 Ill. 377, the Supreme Court of Illinois takes the view that any solicitation in a controversy between an employer and a labor union is unlawful unless there is an employer-employee relation between the parties; that such solicitation is an unlawful interference with property rights; and that no protection is afforded in such a case by the guarantees of freedom of speech and of assembly.

This Court has said that members of a local union not employees "have sufficient interest in the wages paid to employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 212-213.

Under the view taken by the Supreme Court of Illinois, the injunction provisions here in issue are sustained; under the view taken by this Court, they would be violative of the Fourteenth Amendment. Which is to govern? Is each state to determine the limits of freedom of speech and of assembly?

Under the view of the Illinois Supreme Court, non-employee solicitation which may interfere with or injure the employer's business is unlawful, and freedom of speech does not authorize such solicitation in any manner. In *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 478, 482, this Court took the position that such solicitation was not unlawful, and that "members of a union might, without special statutory authorization by the state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." Attention

should be called to the fact that in the *Senn* case, as here, "Neither Senn or any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them." (301 U. S., at p. 473.) Here again is a clear disagreement between this Court and the state court as to what is a lawful use of the right of free speech.

Certain elements of violence having been admitted in the present case by a motion equivalent to a demurrer, future peaceful solicitation may be enjoined under the law as declared by the Supreme Court of Illinois, and any solicitation is tantamount to force because, under the view of the Supreme Court of Illinois, solicitation in any labor controversy not involving an existing employer-employee relation between the parties is unlawful. Attention has already been called to the fact that the rulings of this Court sustain the right of non-employees to seek by peaceable persuasion to improve the conditions as to wages or otherwise with respect to non-union employers and employees. And although previous violence by non-employees had been clearly shown by evidence, this Court held it improper to enjoin future "lawful and peaceable persuasion." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, pp. 212-213.

Upon the issue as to whether future acts of peaceful persuasion may be enjoined because there may have been prior acts of violence, there seems to be a positive conflict of views between this Court and the Supreme Court of Illinois.

Here again attention should be called to the fact that acts of violence clearly existed in the *American Steel Foundries* case and that here admission of violence was only by motion to dismiss. And attention is further called to the fact that the permanent injunction here at issue

is based, not upon violence, but upon a finding of the Appellate Court of Illinois, affirmed by the State Supreme Court, that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)." (R. 37.)

It is urged that peaceful solicitation and the encouragement of such solicitation are but parts of an unlawful scheme, and are enjoinable for that reason. This brings us back to the question as to whether peaceful and otherwise lawful acts by non-employees are unlawful in a labor controversy. Although appearing in the same injunction as are restraints on violence, the peaceful acts here in issue are here enjoined not as parts of a scheme but as acts separate and independent of any acts of violence. That it is not necessary to enjoin peaceful solicitations in order to restrain violence is clearly recognized by the Supreme Court of Illinois. (See page 26.)

If this Court should regard it as its duty to follow the state courts, each state court may set its own standards as to what conduct is unlawful and beyond the protection of the federal constitutional guarantee of freedom of speech and of assembly, and this Court would be bound by such standards. This would mean that in the present case this Court would abandon its views, and accept the Illinois Court's views, as to the unlawfulness of (1) peaceful solicitation by non-employees in a labor controversy; (2) injury to the employer's business incident to such peaceful solicitation; and (3) future peaceful persuasion where there has in the past been an element of force or violence. These are unlawful under the state judicial standard in Illinois, and are lawful under the standards set by this Court. The state court finally determines what is the law of the state, but it cannot

decide finally whether the law so determined infringes rights guaranteed by the Constitution of the United States, nor can it establish controlling standards for the determination of the scope of such rights. Without a power of final determination of these rights by this Court "the Constitution of the United States would be different in different states, and, might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 348.

It is true that differing standards with respect to labor controversies have been adopted in the several states by judicial decisions or statutes, or by the two combined. The courts of Illinois and Ohio (*Crosby* v. *Rath,* 136 Ohio St. 352) may be unitedly of the view that peaceful solicitation is unlawful except where there is a proximate employer-employee relation, whereas other courts adopt the contrary view, but it is for this Court to determine the scope of free speech and of assembly in such peaceful solicitation, and it has determined adversely to the Illinois Court: Where peaceful solicitation by non-employees is held lawful, it is commonly said that the resulting injury to the employer is incidental and must be endured. *People* v. *Harris,* 104 Colo. 386, 392-394, 91 Pac. (2d), 989, and cases cited in recent unreported decision by the same court in *Denver Local Union* v. *Perry Truck Lines* (March 18, 1940.) Here again it is for this Court to determine the scope of free speech and of assembly, and this Court has, adversely to the Illinois court, held that such solicitation is lawful and that it is not rendered unlawful by resulting injury to the employer. *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468.

V.

The Balancing of Constitutional Rights Sustains Freedom of Speech and of Assembly in This Case.

Much is said by the Supreme Court of Illinois about co-equal constitutional rights which must be harmonized. To permit a previous judicial censorship of the right of speech will not only violate the principles previously adhered to by this Court, but will leave no right of free speech to be harmonized with other constitutional rights.

Petitioners contend that in the present case the objective is lawful, and that the means of its accomplishment through peaceful solicitation are lawful and are improperly enjoined by the first four paragraphs of the injunctions in this case. There is not a conflict between property and individual rights. Here as in other cases the individual rights must be exercised within proper limits, and there is a remedy for the abuse of freedom of speech. But where the purpose is lawful and the means of its accomplishment are lawful, this Court has properly taken the position in the *Senn* and *Schneider* cases that an injury incident to the exercise of individual rights may not defeat these rights.

That injury may result from abuse of freedom of speech in any case is recognized in the recent case of *Schneider* v. *State*, 60 S. Ct. 146, 84 L. Ed. 115; and that the same principle applies in labor controversies as elsewhere is made clear by the facts of the *Snyder* case which was decided with *Schneider* v. *State*.

The harmonizing of co-equal constitutional rights, referred to by the Supreme Court of Illinois, is accomplished by a restraint upon force or violence. But where the purpose is lawful, even though its accomplishment

may be injurious, it may not be restrained by a previous censorship of freedom of speech, although there may be and is a remedy for the abuse of such freedom.

In conclusion, attention is called to the fact that this petition in no way seeks to protect violence, but rather to discourage violence or force. The suppression of free speech does not suppress but encourages violence.

Respectfully submitted,

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